



Division of Hearings and Appeals

In the Matter of

Office of the Inspector General, Petitioner

vs.

██████████, Respondent

DECISION

Case #: FOF - 203425

On October 13, 2021, a petition was filed under Wis. Admin. Code §HA 3.03, and 7 C.F.R. § 273.16, to review a decision by the Office of the Inspector General to disqualify ██████████ from receiving FoodShare benefits (FS) one year. A notice of hearing informed the respondent of the telephone hearing scheduled for November 30, 2021, at 9:00 a.m. At that time, an administrative law judge (ALJ) contacted the respondent who stated she was unaware of the hearing and had not received the hearing notice or exhibits. The ALJ confirmed the respondent's mailing address and agreed to reschedule the hearing. On November 30, 2021, a hearing notice was issued to the parties informing the parties of the rescheduled telephone hearing on December 16, 2021, at 1:00 p.m. At that time, the ALJ attempted to contact the respondent and left a message for the respondent on her voicemail, requesting that she return the call. The respondent did not return the call. The hearing was held on Thursday, December 16, 2021, at 01:30 PM by phone.

The issue for determination is whether the respondent committed an Intentional Program Violation (IPV).

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:

Office of the Inspector General
Department of Health Services - OIG
PO Box 309
Madison, WI 53701

Respondent:

██████████
████████████████████
██████████

ADMINISTRATIVE LAW JUDGE:

Debra Bursinger
Division of Hearings and Appeals

FINDINGS OF FACT

1. The respondent (CARES # [REDACTED]) was a resident of Wisconsin who received FS benefits in Racine County from September 1, 2016 through September 30, 2019.
2. On May 19, 2016, the respondent submitted an employer verification from [REDACTED] verifying that she was employed 40 hours/week at \$9.00/hour.
3. On May 23, 2016, the FS agency issued a notice of decision to the respondent informing her that she would continue to receive FS benefits. The notice informed her that her eligibility and allotment was based on a household of four, her reported employment and income with [REDACTED] of \$1548/month, rent of \$699/month and utility expenses. The notice informed her of the requirement to report to the agency by the 10th day of the next month if her household's gross monthly income exceeded \$2628.
4. On September 25, 2016, the respondent submitted a Six-Month Report Form (SMRF). She reported no changes in household income and employment with [REDACTED] of 40 hours/week at \$9.50/hour.
5. On September 27, 2016, the agency issued a notice of decision to the respondent informing her that she would continue to receive FS benefits for a household of four based on gross monthly income of \$1440 from her employment at [REDACTED] and rent expense of \$699/month. The notice also informed her of the requirement to report to the agency by the 10th day of the next month if her gross monthly household income exceeded \$2633.
6. On July 10, 2017, the agency issued a notice of decision to the respondent informing her that she would continue to receive FS benefits for a household of four based on gross monthly income of \$2438 from her employment with [REDACTED] and rent expense of \$714/month. The notice also informed her of the requirement to report to the agency by the 10th day of the next month if her gross monthly household income exceeded \$2633.
7. On August 28, 2017, the respondent submitted a SMRF. She reported employment and income with [REDACTED] and child support income.
8. On September 11, 2017, the agency issued a notice of decision to the respondent informing her that she would continue to receive FS benefits based on a household of four and her income from [REDACTED] and child support of \$2634.72/month. The notice also informed her of the requirement to report to the agency by the 10th day of the next month if her gross monthly household income exceeded \$2665.
9. On July 30, 2019, the agency issued a notice of decision to the respondent informing her that she would continue to receive FS benefits based on a household of four and gross monthly household income of \$299.77 from child support. The notice informed her of the requirement to report to the agency by the 10th day of the next month if her gross monthly household income exceeded \$2720.
10. In February 2020, the agency sent a notice to the respondent with a summary of information on the respondent's case. The notice informed the respondent of the requirement to report any inaccurate information in the summary to the agency. The summary noted the respondent had reported employment with [REDACTED] beginning January 1, 2019; with the [REDACTED] beginning July 22, 2019 and ending February 16, 2020; with NSH Summit beginning November 29, 2018.
11. In September 2020, the agency obtained actual gross income for the respondent from [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED].
12. On October 18, 2021, the agency issued FS Overpayment Notices to the Petitioner. The Petitioner did not appeal the overpayment action.
13. On October 18, 2021, the petitioner prepared an Administrative Disqualification Hearing Notice alleging that the respondent failed to timely and accurately report her household income.
14. The respondent failed to appear for the scheduled December 16, 2021 Intentional Program Violation (IPV) hearing and did not provide any good cause for said failure to appear.

DISCUSSION

An intentional program violation of the FoodShare program occurs when a recipient intentionally does the following:

1. makes a false or misleading statement, or misrepresents, conceals, or withholds facts;
or
2. commits any act that constitutes a violation of the Food Stamp Act, the Food Stamp Program Regulations, or any Wisconsin statute for the purpose of using, presenting, transferring, acquiring, receiving, possessing, or trafficking of FoodShare benefits or QUEST cards.

FoodShare Wisconsin Handbook, § 3.14.1; *see also* 7 C.F.R. § 273.16(c) and Wis. Stat. §§ 946.92(2).

An intentional program violation can be proven by a court order, a diversion agreement entered into with the local district attorney, a waiver of a right to a hearing, or an administrative disqualification hearing, *FoodShare Wisconsin Handbook*, § 3.14.1. The petitioner can disqualify only the individual found to have committed the intentional violation; it cannot disqualify the entire household. Those disqualified on grounds involving the improper transfer of FS benefits are ineligible to participate in the FoodShare program for one year for the first violation, two years for the second violation, and permanently for the third violation. Although other family members cannot be disqualified, their monthly allotments will be reduced unless they agree to make restitution within 30 days of the date that the FS program mails a written demand letter. 7 C.F.R. § 273.16(b).

7 C.F.R. §273.16(e)(4) provides that the hearing shall proceed if the respondent cannot be located or fails to appear without good cause. The respondent did not appear or claim a good cause reason for not attending the hearing. Therefore, I must determine whether the respondent committed an IPV based solely on the evidence that the petitioner presented at hearing.

For the petitioner to establish that an FS recipient has committed an IPV, it has the burden to prove two separate elements by clear and convincing evidence. The recipient must have: 1) committed; and 2) intended to commit a program violation per 7 C.F.R. § 273.16(e)(6). In *Kuehn v. Kuehn*, 11 Wis.2d 15 (1959), the court held that:

Defined in terms of quantity of proof, reasonable certitude or reasonable certainty in ordinary civil cases may be attained by or be based on a mere or fair preponderance of the evidence. Such certainty need not necessarily exclude the probability that the contrary conclusion may be true. In fraud cases it has been stated the preponderance of the evidence should be clear and satisfactory to indicate or sustain a greater degree of certitude. Such degree of certitude has also been defined as being produced by clear, satisfactory, and convincing evidence. Such evidence, however, need not eliminate a reasonable doubt that the alternative or opposite conclusion may be true. ...

Kuehn, 11 Wis.2d at 26.

Wisconsin Jury Instruction – Civil 205 is also instructive. It provides:

Clear, satisfactory, and convincing evidence is evidence which when weighed against that opposed to it clearly has more convincing power. It is evidence which satisfies and convinces you that “yes” should be the answer because of its greater weight and clear convincing power. “Reasonable certainty” means that you are persuaded based upon a rational consideration of the evidence. Absolute certainty is not required, but a guess is not enough to meet the burden of proof. This burden of proof is known as the “middle burden.” The evidence required to meet this burden of proof must be more convincing than merely the greater weight of the credible evidence but may be less than beyond a reasonable doubt.

Further, the *McCormick* treatise states that “it has been persuasively suggested that [the clear and convincing evidence standard of proof] could be more simply and intelligibly translated to the jury if they were instructed that they must be persuaded that the truth of the contention is highly probable.” 2 *McCormick on Evidence* § 340 (John W. Strong gen. ed., 4th ed. 1992).

Thus, to find that an IPV was committed, the trier of fact must derive from the evidence a firm conviction as to the existence of each of the two elements even though there may be a reasonable doubt as to their existence.

To prove the second element, i.e., intention, there must be clear and convincing evidence that the FS recipient intended to commit the IPV. The question of intent is generally one to be determined by the trier of fact. *State v. Lossman*, 118 Wis.2d 526 (1984). There is a general rule that a person is presumed to know and intend the probable and natural consequences of his or her own voluntary words or acts. *See, John F. Jelke Co. v. Beck*, 208 Wis. 650 (1932); 31A C.J.S. Evidence §131. Intention is a subjective state of mind to be determined upon all the facts. *Lecus v. American Mut. Ins. Co. of Boston*, 81 Wis.2d 183 (1977). Thus, there must be clear and convincing evidence that the FS recipient knew that the act or omission was a violation of the FS Program but committed the violation anyway.

Based upon the record before me, I find that the petitioner has established by clear and convincing evidence that the respondent intentionally violated FS program rules, and that this violation was the first such violation committed by the respondent. The petitioner agency produced evidence that the respondent was informed of her reporting requirements. The respondent’s income exceeded the reporting limit in July 2016 and continued to exceed the limit for most of the period between July 2016 and August 2020. The respondent repeatedly failed to report increased income as required. The agency produced the actual gross income information it obtained from various employers. The agency also produced the evidence to demonstrate that the respondent repeatedly failed to report employment and income accurately at the time of application and renewals. This evidence shows an intent by the respondent to provide false or misleading information to receive FS benefits that she was not entitled to receive. Based on the evidence presented, I conclude the petitioner correctly seeks to disqualify the respondent from the FS program for one year.

CONCLUSIONS OF LAW

1. The respondent violated, and intended to violate, the FS program rule specifying that FS recipients report truthful and accurate information.
2. The violation specified in Conclusion of Law No. 1 is the first such violation committed by the respondent.

NOW, THEREFORE, it is

ORDERED

That the petitioner’s determination is sustained, and that the petitioner may make a finding that the respondent committed a first IPV of the FoodShare program and disqualify the respondent from the program for one year, effective the first month following the date of receipt of this decision.

REQUEST FOR A REHEARING ON GROUNDS OF GOOD CAUSE FOR FAILURE TO APPEAR

In instances where the good cause for failure to appear is based upon a showing of non-receipt of the hearing notice, the respondent has 30 days after the date of the written notice of the hearing decision to claim good cause for failure to appear. *See* 7 C.F.R. sec. 273.16(e)(4). Such a claim should be made in writing to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

APPEAL TO COURT

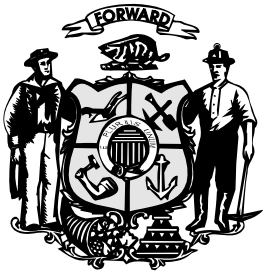
You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, WI 53703, **and** on those identified in this decision as “PARTIES IN INTEREST” **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing request (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Milwaukee,
Wisconsin, this 12th day of January, 2022

\sDebra Bursinger
Administrative Law Judge
Division of Hearings and Appeals

c: Office of the Inspector General - email
Public Assistance Collection Unit - email
Division of Health Care Access and Accountability - email
[REDACTED] - email



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on January 12, 2022.

Office of the Inspector General
Public Assistance Collection Unit
Division of Health Care Access and Accountability
[REDACTED]